



July 23, 1999

Mr. Scott Fawcett  
Legal Counsel  
Open Records Division  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR99-2081

Dear Mr. Fawcett:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126571.

The Comptroller of Public Accounts (the “comptroller”) received a written request for all personnel records pertaining to a former Treasury employee. You seek to withhold some of the requested records, or portions thereof, pursuant to sections 552.101, 552.107, 552.117, and 552.130 of the Government Code.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Some of the documents you submitted to this office for review are made confidential by statute. The “Handicapped Employee Survey Sheet” is made confidential under the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. § 12101 *et seq.* As noted in Open Records Decision No. 641 (1996),

Title I of the ADA and the EEOC regulations adopted pursuant to specific statutory authority provide for the confidentiality of medical condition and history information collected from applicants and employees. Section 12112(d)(3)(B) of the ADA provides that ‘medical condition or history’ information collected on applicants after an employment offer is made and accepted must be ‘collected and maintained on separate forms and in separate medical files and . . . treated as a confidential medical record.’ *See also* 29 C.F.R. § 1630.14(b)(1) (providing that information ‘*shall* be collected and

maintained on separate forms and in separate medical files and be treated as a confidential medical record') (emphasis added).

ORD 641 at 6. Accordingly, the comptroller must withhold the medical survey sheet pursuant to the ADA.

You have also submitted the former employee's federal W-4 forms. These records constitute confidential "tax return information" and as such must be withheld pursuant to federal law. *See* 26 U.S.C. § 6103.

You next contend that the Employees Retirement System "Personal Data" sheet is made confidential under section 815.503 of the Government Code. Section 815.503 provides:

Records of members and beneficiaries under retirement plans administered by the retirement system *that are in the custody of the system* are considered to be personnel records and are required to be treated as confidential information under Section 552.101.

The requested information, however, is in the custody of the comptroller. Consequently, we do not believe that section 815.503 applies to the "Personal Data" sheet in this instance. *But see* Open Records Letter No. 98-2196 (1998) (records held by comptroller while acting as trustee responsible for administering judicial retirement programs confidential under section 815.503).

This does not end our discussion, however, as to whether the "Personal Data" sheet must be released to the requestor. As noted above, section 552.101 of the Government Code also excepts from public disclosure information made confidential by judicial decision. This includes information made confidential by common-law privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The "Personal Data" sheet reveals the former employee's designation of beneficiaries of the employee's retirement benefits. This information reflects a personal financial decision that is protected by common-law privacy. *See* Open Records Decision No. 600 at 11 (1992). We have marked the information that the comptroller must withhold from this document. The remaining information must be released.

You have also submitted documents that pertain to an investigation of alleged sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen*

contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen, supra*, at 525. However, the court ordered the release of the affidavit of the person under investigation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.*

Along with the other records of the investigation, you have submitted a four-page memorandum dated June 14, 1994, which we believe constitutes an adequate summary of the allegations, the subsequent investigation, and the disciplinary actions that followed. In accordance with *Ellen*, the comptroller must release this memorandum to the requestor with the name of the victim redacted.<sup>1</sup> All remaining records pertaining to the investigation must be withheld.<sup>2</sup>

You also contend that the comptroller must withhold pursuant to section 552.117(1) the former employee’s home address, home telephone number, social security number, and information revealing whether the employee has any family members. Section 552.117(1) must be read in conjunction with section 552.024 of the Government Code, which provides in pertinent part:

(a) Each employee or official of a governmental body and each *former employee* or official of a governmental body shall choose whether to allow public access to the information in the custody of the governmental body that relates to the person’s home address, home telephone number, or social security number, or that reveals whether the person has family members.

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<sup>1</sup>Because the memorandum does not contain information that would allow the public to identify any other individual, *see Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995), the victim’s name is the only information that must be withheld.

<sup>2</sup>Because we resolve this aspect of your request under section 552.101, we need not address the applicability of section 552.107(1) to any of these materials.

(b) Each employee and official and each *former employee* and official shall state that person's choice under Subsection (a) to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which:

....

(3) *the former employee or official ends service with the governmental body.*

....

(d) If an employee or official or a former employee or official fails to state the person's choice within the period established by this section, the information is subject to public access. [Emphasis added.]

Accordingly, section 552.117(1) is applicable only if the former employee made his election in compliance with section 552.024 prior to the comptroller's receipt of the open records request. *See* Open Records Decision No. 530 (1989) (character of requested information as public under section 552.117 is determined as of time request for information is made).

None of the information you have submitted to this office suggests that the former employee made such an election under section 552.024 during, or upon the termination of, his employment with the comptroller, and for purposes of this ruling we will assume that such is the case. You seem to suggest, however, that because the employee has made such an election with a subsequent employer, the personnel records held by the comptroller are now subject to that election. If that is your argument, we must disallow it. Had the employee wished to enjoy the protection of section 552.117(1) for his employment records held by the comptroller, the section 552.024 election should have been made at one of the appropriate times during employment there. The comptroller may not withhold any of the information at issue pursuant to section 552.117(1) solely because of the employee's subsequent election with another governmental employer.

Finally, section 552.130(a)(1) of the Government Code requires that the comptroller withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Additionally, section 552.130(a)(2) requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." We agree that the information you have marked must be withheld from the public pursuant to section 552.130(a) of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts

presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Burns".

Michael J. Burns  
Assistant Attorney General  
Open Records Division

MJB/RWP/eaf

Ref.: ID# 126571

Encl. Marked documents

cc: Mr. C.L. Fox  
3017 Sesbania  
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(w/o enclosures)